

IN THE SENATE OF THE UNITED STATES.

DECEMBER 7, 1858.—Ordered to lie on the table.

DECEMBER 13, 1858.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents from the Post Office Department, numbered from 1 to 12, exhibited as evidence in the case and transmitted to the House of Representatives.
3. Depositions offered by the claimant, and numbered 1, 2, and 3, transmitted to House of Representatives.
4. Brief of claimant's counsel.
5. Brief of United States solicitor.
6. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 7th day of December,
[L. s.] A. D. 1858.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Court of Claims of the United States :

The petition of Alexander M. Cumming, of Princeton, Mercer county, New Jersey, respectfully represents that in the year 1836 he was a contractor for carrying the mails from New York to Philadelphia, in post coaches, on route No. 951, and carried such mail twenty-three days in the month of December of that year, the value of which service, according to the contract price, was \$700. Payment for the above service was demanded of and refused by the Postmaster General, on the ground that your petitioner's contract was annulled on the 8th of December, 1836; while your petitioner insists that it was not annulled until new schedules were furnished, and until

a new arrangement of the mails, which went into operation on the first day of January, 1837; and if his contract was annulled on the 8th of December, 1836, the direction of the Postmaster General, for your petitioner to "continue carrying the mails on 951 and 952 until otherwise ordered," operated as a new, or enlargement of the old contract, and authorized your petitioner to perform the service above mentioned, which he did in good faith, and for the public interests.

Your petitioner further represents that in the year 1836, he expended the sum of \$827 71, for forwarding the United States mails on route No. 951, during an unusually inclement season. That for several days, owing to the severity of the storm, the mails from the south did not arrive in Philadelphia, and the like delay of mails from the east existed at New York, which devolved on your petitioner such an extraordinary quantity of mails, as made it wholly impracticable for him to transport them by his teams, which were ample for his regular mails. That he performed the above service, and incurred the above expenses at the request of Colonel Page, postmaster of Philadelphia, and in obedience to the requirements of George Plitt, agent of the Post Office Department, whose directions were approved by the Postmaster General, as were the exertions of your petitioner, who received the strongest assurances of payment for his extraordinary expenses.

Your petitioner also represents that he made proposals for carrying the United States mails on routes No. 951 and 952, from Philadelphia to New York, for four years, with a deduction from each in case both were accepted. That both were accepted for four years, and one contract was annulled against his consent, at the end of one year; in consequence of which, he insists that he is entitled to receive the maximum payment in the contract which was continued and performed by him for the whole period.

Your petitioner also insists that, under his contract, he was entitled to carry the United States mail on the routes above mentioned until Congress authorized the carrying of the mails on railroads, in the month of July, 1838.

That in consequence of the annulling of his contract by the Postmaster General, your petitioner has sustained damage to the amount of \$15,750. An estimate of his damages, and proof thereof, will be made and furnished to the court before the final hearing on his petition.

Your petitioner further sheweth that his claims were presented at the General Post Office for adjustment, and disallowed by the Postmaster General and the Auditor of that office, as will appear by their decisions and the report of the said Auditor, dated February 19, 1842; and also by the First Comptroller of the Treasury, on an appeal to him from the decision of the auditor.

His claim was then presented to Congress, during the same year, and an adverse report made thereon, in the Senate, on the 5th of April, 1842.—(See Senate Doc. No. 219, 2d Sess. 27th Congress.) A favorable report was subsequently made upon a portion of his claim, in the House of Representatives, January 30, 1846.—(See House of Representatives Doc. 169, 1st Sess. 29th Congress.)

A joint resolution, predicated on said report, was subsequently passed; but it afforded your petitioner no relief, the word "equitably" in said resolution having been stricken out, and an unfavorable report made by the auditor of the Post Office Department. In the winter of 1854 he again presented his petition in the Senate, and it was referred to the Committee on Post Offices and Post Roads, but no definite action has since been had. Your petitioner being sole owner of said demands and alone interested therein, never having sold, assigned, nor transferred the same, or any part thereof, insists that his claims abovementioned should be paid by the United States, with interest thereon from the time when he was entitled to the same, and prays that a favorable report may be made by this honorable court in relation thereto, to the end that an act may be passed by Congress for his relief.

He refers to the papers on the files of Congress and General Post Office, and requests that his case against the United States may be placed upon the docket of claims presented to this court, and that a commission may be issued for the purpose of obtaining the testimony of George Plitt, of Philadelphia, Joseph Cunningham, of Trenton, New Jersey, John V. D. Joline, of Princeton, New Jersey, and Peter R. Stelle, of New York city, in support of the claims above mentioned.

Your petitioner further sheweth that the acceptance of his proposals, the contracts, and other papers and decisions referred to in this petition, are not in his possession, but are believed by him to be in the auditor's office of the Post Office Department; and your petitioner has caused application to be made to the General Post Office Department for a copy of said contracts; but the Second Assistant Postmaster General, in pursuance of a rule of the Postmaster General, has refused such copies without an order of this court for that purpose, for which order your petitioner now applies, and prays it may be granted.

Respectfully submitted.

ALEXANDER M. CUMMING.

PRINCETON, NEW JERSEY, *January 15, 1856.*

STATE OF NEW JERSEY, }
Mercer county, } ss.

On this twenty-fifth day of January, 1856, before the subscriber, a justice of the peace in and for said county, personally appeared Alexander M. Cumming, above named, and made oath in due form of law, that the facts stated in the above petition are true to the best of his knowledge and belief.

ALEXANDER M. CUMMING.

Sworn and subscribed this twenty-fifth day of January, A. D. 1856, before me.

AUGUSTUS L. MARTIN,
Justice of the Peace.

No. 4.

COURT OF CLAIMS.

*Particulars of petitioner's claim.*ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

I.

The United States to Alexander M. Cumming, DR.

1836. For carrying the United States mail on route No. 951, from New York to Philadelphia in post coaches, from December 7, 1836, to January 1, 1837, 24 days, at the contract price \$2,625 per quarter, by order of the Postmaster General... \$700 09
Interest on the above services rendered under act of June 3, 1784, from January 1, 1837, to time of payment at 6 per cent.

II.

1836. For furnishing extra teams and transporting a large amount of mail matter which had accumulated during a great snow storm on said route, including his extraordinary expenses, by order of the Postmaster General or his agent..... 827 71
For interest on the above from February 1, 1836, to time of payment at 6 per cent.

III.

1837. For the maximum pay for services in transporting Jan. 1, the United States mail on route No. 952, from January 1, 1837, to July 1, 1840, $3\frac{1}{2}$ years, at \$9,990 per annum, deducting therefrom the amount received, \$8,991, balance due being 10 per cent., retained by the Postmaster General..... 3,496 50
Interest on the above from each quarter day after January 1, 1837, as it accrued to the time of payment at 6 per cent.

IV.

For losses and damages in consequence of the violation by the Postmaster General of a contract awarded to petitioner for carrying the United States mail on route No. 951, from New York to Philadelphia, from January 1, 1837, to July 7, 1838, 18 months and 7 days, as shown by three witnesses. Average of their estimate of net profits, as appears from answers to interrogatory No. 12, \$233 per week, 79 weeks..... 18,407 00

For like damages sustained by contractor from July 7, 1838, to January 1, 1840, when his mail contract ended; 77 weeks, 3 days, at \$233 per week \$18,040 85

The contract pay after deducting 20 per cent. on route No. 951, was \$10,500 per annum, for three years, \$31,500.

For depreciation of contractor's property on route No. 951, in consequence of the annulling of his contract by the Postmaster General. See answers of Messrs. Joline, Cunningham, and Stelle, to interrogatory No. 8 3,000 00

Deduct one month's extra pay, which petitioner received December, 1836, \$875.

COURT OF CLAIMS.

Brief.

ALEXANDER M. CUMMING vs. THE UNITED STATES.

I. From the evidence in the case it appears that the petitioner was a contractor for carrying the United States mails on route No. 951 and 952, between New York and Philadelphia, by virtue of two contracts dated October 27, 1835. His bids were \$13,125 for route No. 951, and \$9,990 for route No. 952, with 20 per cent. off on No. 951 in case No. 952 should be awarded to him, and 10 per cent. from the sum contained in that for No. 952, should he obtain the contract for No. 951. Both contracts were awarded to him. These contracts were to commence on the 1st day of January, 1836, and to continue in force four years from that time. They contain the usual printed clause, authorizing the Postmaster General to terminate them on forwarding six months' notice of his intention so to do. They also contain a written clause to the effect that, "That in case any arrangement shall hereafter be made under the authority of Congress, to carry the mails for the whole or any part of the route on railroads, then this contract shall be annulled." The letter of acceptance of the petitioner's proposals, addressed to him by the Postmaster General, and which forms a part of the contract, is as follows:

POST OFFICE DEPARTMENT, NORTHERN DIVISION,
December 3, 1835.

SIR: The Postmaster General has accepted your proposal for transporting the mail on route No. 951, at \$13,125, with a deduction

of 20 per cent.; and on condition that in case any arrangement shall hereafter be made under the authority of Congress, to carry the mail for the whole or any part of the route on railroad, then your contract to be annulled, or there shall be a pro rata reduction, as the case may be. And he has also accepted your proposal for route No. 952, at \$9,990 per annum, with a deduction of 10 per cent., and under the same conditions as No. 951; to be run by Princeton, Brunswick, Newark, &c. Contracts and bonds will be forwarded for your execution.

S. R. HOBBIE,

First Assistant Postmaster General.

ALEXANDER M. CUMMING,

Newark, New Jersey.

Under these contracts the petitioner transported the mails on the routes designated, and was entitled to the price agreed upon for the service required. On the 6th of December, 1836, a letter was addressed by Mr. Dyer, for the Postmaster General, to the petitioner, informing him that his contract for No. 951 was annulled, an agreement having been made with the Camden and Amboy railroad to transport the great mail between New York and Philadelphia, and an arrangement made with petitioner for an improvement on No. 952, to supply certain offices that depended on No. 951. The pay on that route was stopped December 7, 1836, but the schedule for the new arrangement bears date December 27, 1836, and was not received by petitioner until the 30th of said month, up to which time he continued to transport the mail; and the postmasters of Newark and New Brunswick state that they received two mails a day from Philadelphia until the 1st of January, 1837, and after that one mail a day.

On the 14th of November, 1836, the Assistant Postmaster General, in a postscript to a letter to petitioner, says: "Continue to carry the mails on route No. 951 and No. 952 until otherwise ordered.

S. R. H."

From a letter of Colonel Page, postmaster of Philadelphia, and the register of the arrivals and departures of the mails kept at the post office in Philadelphia, now in the office of the Auditor for the Post Office Department, it appears that the mails were regularly delivered to and carried by the petitioner, on said route, until 31st December, 1836. The letter of C. Dyer was not an order to discontinue the service, nor was it so considered by the contractor or postmasters; and even if the Postmaster General intended to have discontinued the route, such order was not transmitted to the postmasters of New York and Philadelphia, nor were any new schedules furnished to them or the contractor (the only orders by which the contractor and postmasters are governed) until the time mentioned, but the postmasters continued to place the mails in charge of the contractor, and requested him to carry them until the schedule was

received. Had the petitioner discontinued the service on route No. 951 on 7th of December, 1836, (the new schedules on No. 952 not having been made,) the whole line would have been deranged, and the service have suffered. The new schedule, *i. e.* the new order, was received by the postmasters and contractor on the 30th of December, and he stopped on the next day, being the end of the month, quarter, and year. This new schedule changed route No. 951 over to the Camden and Amboy railroad, and also changed the hour of No. 952 from 6 a. m. to 9 p. m., commencing on the 1st of January, 1837. The omission of the Postmaster General to furnish the new schedules justified the contractor in carrying the mail until the end of the year; and the fact that he did perform the service at the request of the postmasters, and under the order of the Assistant Postmaster General, "To continue carrying the mail until otherwise ordered," shows that even if the Postmaster General had the right to, and did put an end to the original contract, his directions above referred to, operated as a new, or enlargement of the old contract, until the schedules were furnished. Besides, a register of the delivery of the mails to the petitioner was daily forwarded to the department, from which it may be inferred that the Postmaster General had knowledge of and gave his assent to the service.

For this service, performed for the United States by the petitioner in good faith, he is fairly entitled to a reasonable compensation, which may be considered the price agreed upon by the parties in the original contract. If the Postmaster General could control or dispense with the service by allowing one month's extra pay, it does not follow that if the service was continued he could employ another person to perform it.

The petitioner is also entitled to interest on the 24 days' service from January 1, 1837, under the act of June 3, 1784, which provides: "That an interest of 6 per cent. per annum shall be paid to all the creditors of the United States for supplies furnished, or services done from the time that payment became due.

II. The petitioner, at the time of the great fall of snow in 1836 which blocked up the roads, and stopped the mails in all the Middle States, performed a large amount of labor, at a heavy expense, in *clearing the snow, and opening the roads, which were impassable*, and furnishing extra teams, and transporting a large amount of mail matter which had accumulated south of Philadelphia and east of New York, which extra labor was performed at the request of Mr. Page, Postmaster at Philadelphia, and by the express direction of George Plitt, special agent of the Post Office Department, under strong assurances that petitioner should be remunerated for his extraordinary services and expenses. In the performance of this extra labor the petitioner expended several hundred dollars, for which proper vouchers were furnished the Post Office Department, but which vouchers were supposed to have been destroyed by the burning of the Post Office building in 1836, in consequence of which, Postmaster General Niles decided that petitioner's claim could not be allowed, for want of suffi-

cient vouchers. The petitioner afterwards procured duplicate vouchers for nearly the whole claim, one or two small items excepted, which in consequence of death or removal of the parties could not be obtained. When these duplicate vouchers were brought to the Post Office Department, in place of those supposed lost by the fire but which were afterwards found, a new Postmaster General was then in office, who objected to opening and examining the case, because he had adopted a rule prohibiting a case once decided from being re-opened without authority of Congress. The action of the officers of the Treasury Department in regard to charges Nos. 1 and 2, does not affect the law of the case, nor the rights of the parties. Devereaux's Reports, pages 80 and 81, No. 296, 298. This extraordinary service, rendered necessary by the act of God, was not provided for in the contract, nor its necessity foreseen. Interest upon the item in question is due to the petitioner, under the act of June 3, 1784 before cited, and upon every principle of justice. These charges were presented to Congress, and allowed by the committee to whom the subject was referred, (see Senate Report No. 28, 2d Session 28th Congress) but the joint resolution, passed in pursuance of said report, proved valueless to the petitioner inasmuch as the accounting officers declined to act or make any allowance under it.

The following is a copy :

Joint Resolution authorizing and directing the examination and settlement of the claims of Alexander M. Cumming. *Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, That the Auditor of the Treasury for the Post Office Department be directed to examine and audit the claims of Alexander M. Cumming of New Jersey, late mail contractor, on routes nine hundred and fifty-one and nine hundred and fifty-two, between the cities of Philadelphia and New York, between the years eighteen hundred and thirty-five, and eighteen hundred and thirty-nine, and it shall be the duty of the Postmaster General to pay him the balance [if any] that may be justly and legally due him under the contracts and orders from the department and its agents out of the current appropriation for mail transportation. January 30, 1846. H. R. 1st Session 29th Cong.

Although this resolution would justify an allowance of petitioner's claims, yet the construction placed upon the contract, acts and orders of the P. M. General by the Auditor in his department has rendered the resolution of no practical value.

III. The claims for the maximum pay for services in transporting the U. S. Mail, on route No. 952, is predicated on the proposals of petitioner, their acceptance, and the contracts which followed. The fair interpretation of the whole is that the deduction of ten per cent was not to be made, unless the petitioner had the benefit and advantages of both routes for the whole period. When the Postmaster General discontinued No. 951, the petitioner's right to maximum pay remained, and he was entitled to the ten per cent under the contract, or by way of damages for the violation of the other by the Postmaster

General. The petitioner states his own and other bids for routes No. 951 and 952 Philadelphia and New York, as follows :

	No. 951.		No. 952.
A. M. Cumming,	\$13,125	A. M. Cumming,	\$9,990
Morris Buckman,	17,000	M. Buckman	7,000
Camden & Amboy R. R.	26,000	C. & A. Railroad,	12,000
Phila. & Trenton R. R.	24,000	Phil. & Trenton R. R.	9,000

That his contract was four years with the privilege of the Department to continue it for 6 months longer, so as to make the year commence in July instead of January, which was done, and he run that mail four and a half years or until July 1840. That the Government saved \$13,500 per annum for three and a half years, or \$47,250 by violating the contract, and effecting his ruin.

IV. The claims for losses and damages sustained by the petitioner in consequence of a violation of the contract for carrying the United States mail from New York to Philadelphia, rests upon a plain and common sense interpretation of the agreement between the parties, which was that petitioner should carry the mails on the route indicated, and be entitled for such service to the price stipulated, for four years "unless Congress should sooner determine to have the mails carried on railroads." The language used by the Postmaster General in his letter accepting the bids, and the written portion of the printed contract, show clearly that such was the "meaning and intention" of the parties. Acting under this belief the petitioner made the necessary investment of capital for a faithful performance of the contract on his part. From the depositions of Messrs. Joline, Cunningham and Stelle in answers to the 5th and 6th interrogatories it appears that 8 four-horse teams, 2 coaches and 2 wagons were placed on each route, making for both lines 16 teams, 4 coaches and 4 wagons, besides extra wagons at a cost of \$12,466. The petitioner also insists that the Postmaster General had no right to put an end to the contract until Congress should authorise the mail to be carried on railroads, and until service of the stipulated notice. The petitioner is therefore not only entitled to his pay for the time he actually carried the mail, but for the whole period covered by his contract, or the damages which he sustained by the action of the Postmaster General in this regard. The act of July 7, 1838 conferred authority on the Postmaster General to put an end to the contract, but he never acted under it, and the case may be considered precisely as if no such authority existed; petitioner's profits were \$10,000 per annum, which were entirely destroyed by the taking away of his line which carried the passengers: see deposition of Joline, Cunningham and Stelle, witnesses of high character going to corroborate the above statement, and prove the heavy losses which the petitioner has sustained. If it be urged that sections 12 and 13 of the printed contract gave the Postmaster General a right to terminate the contract when he did, on route No. 951, it may be answered, that those sections being repugnant to and inconsistent with his agreement that "he would not" terminate the contract until an arrangement should

be made for carrying the mails on railroads under the authority of Congress, operated as a repeal of these sections, or justified the petitioner in considering it an independent covenant for the violation of which the United States are liable to respond in damages. The second section of the act "to establish certain post routes and to discontinue others," passed July 7, 1838, (eighteen months after the action of the Postmaster General) provides "That each and every railroad within the limits of the United States, which now is or hereafter may be made and completed shall be a post route, and the Postmaster General shall cause the mail to be transported thereon, provided he can have it done upon reasonable terms, and not paying therefor in any instance more than twenty-five per centum over and above what similar transportation would cost in post coaches," approved July—, 1838.—(See Post Office Laws and Regulations, page 50, or Statutes at Large.) Under this act the Postmaster General was authorized to annul the contract, but no action was taken by him after its passage, and the petitioner is therefore not only entitled to the damages which he sustained previous to its passage, but for the whole time covered by his contract. It is recorded in the Digest of Justinian "That he who has hired his services to another is to receive his reward for the whole time, if it has not been his fault that the services have not been performed." It was not the fault of petitioner that the stipulated service was not performed, for he made every arrangement for carrying his agreement into effect, and continued the service until the contract was taken from him and turned over to R. F. Stockton, or the Camden and Amboy Railroad Company, which was long before railroads were established by law as post routes. The records of the Post Office Department contain the following:

"R. F. Stockton proposes to carry the mail on route No. 951, at the price it is now carried, say \$10,500. It is considered the interest of the department to accept the proposition. A. K."

R. F. Stockton agrees to carry the express mail and great mail consolidation in railroad cars, &c., for the lowest bid for an express mail, viz: \$14,000 added to the present cost of the great mail, \$10,500, conforming to the hours required by the department, and to carry into contract a bid for the second mail between New York and Philadelphia accepted at the last letting, at \$3,000, giving two daily mails between the two cities by railroad. It is deemed the interest of the department to carry this proposal into contract.

SEPTEMBER 16, 1836.

A. K.

It is apparent from the foregoing, that while the interests of the department were promoted by annulling the contract for route No. 951, the rights of the petitioner were entirely disregarded, and his pecuniary ruin effected. His claims Nos. 1, 2 and 3, having been rejected by the Postmaster General, it is not surprising that petitioner's claim for damages which he sustained by the depreciation of his property and loss of his passengers, was not by him urged when he had no means of enforcing his rights, and could only sue for them in the language of solicitation. The establishment of a Court of

Claims, an act so creditable to Congress and satisfactory to the people, has induced the petitioner to continue his efforts to obtain that relief which has hitherto been denied him, and to which he is most justly entitled.

Respectfully submitted,

J. D. WOODWARD,
Solicitor and Counsel for Petitioner.

FEBRUARY 25, 1857.

Memorandum for reply to brief of United States Solicitor.

ALEXANDER M. CUMMING *vs.* The UNITED STATES.

I.

The decision of the Auditor of the Post Office Department (P. G. W.) on the 30th September 1848, on that part of petitioner's claim which was referred to that officer, is not conclusive, nor is it a bar to a recovery before this court, for there is nothing in the resolution of Congress which makes the decision of the Auditor or Comptroller conclusive. They should have carried out the intention of Congress as evinced by the reports of the committees, and were not justified in adopting a previous adverse decision. In the case of *Beaugrand vs. The United States*, Chief Justice Gilchrist says: "where the claimant upon petition makes out his case against the United States, the court grants relief notwithstanding a previous decision of the War Department that, the claimant could not receive the compensation sought under a resolution and act of Congress through the instrumentality of the Department on account of its existing regulations."

It is conceded by the solicitor that if the mails which accumulated at New York and Philadelphia had belonged to other routes than the one embraced by petitioner's contract, he might justly claim compensation for their transportation. Now, it will not be denied that a large part of the mail matter which petitioner transported belonged to other routes, and had accumulated in consequence of the storm. The necessity of this extraordinary service and expense of cutting out roads and forcing the United States mail through snow drifts was not foreseen, and the promise of payment on the part of Mr. Plitt, agent of the United States, ought to decide the question in favor of the petitioner.

See House report No. 169, first session Twenty-ninth Congress, and Resolution House of Representatives No. 12, same Congress.

II.

The claims for damages which the petitioner sustained in consequence of a violation of the contract by the Postmaster General were not submitted, nor have they been acted upon by the department

or by Congress. The solicitor says: "the claim for \$17,750 damages or any other amount of damage must depend upon the terms of the contract, and if it appear that the Post Office Department has not violated its terms, then the plaintiff has shown no legal ground to recover." We admit the correctness of this view, but show conclusively that the Postmaster General by his premature action has violated his contract, and subjected the petitioner to the heavy losses which he has sustained.

The petitioner is entitled to the actual value of his contract which was violated by the Postmaster General.—See case of *Masterdon vs.*

seventh Hill's Reports, p. —, and opinion of Attorney General Cushing, volume 6, page 516; also the testimony of Messrs. Joline, Cunningham and Stelle.

No. 5.

IN THE COURT OF CLAIMS.

Solicitor's Brief.

ALEXANDER M. CUMMING *vs.* THE UNITED STATES.

The petitioner's claim rests on four distinct grounds, to wit:

1st. He claims for twenty-three days' continued service in the month of December, 1836, on route No. 951, at the contract price per quarter of \$2,625, making \$656 25.

2d. He claims extra compensation for transporting an accumulated amount of mail matter at Philadelphia and New York in the early part of January, 1836, in consequence of severe weather.

3d. He claims to have 10 per cent. added to his contract No. 952, because that amount was deducted from it in consideration that he was to receive contract No. 951, which was awarded to him, and afterwards annulled by the department before the time limited for its continuance.

4th. He claims \$15,750 damages on account of the annulment of contract No. 951.

The first three items of this claim were presented to the Post Office Department at different times for settlement, and disposed of adversely, which action we think proper and final, under the circumstances disclosed in the papers before the court. The claim of 10 per cent. was referred to Mr. Whittlesey, Auditor for the Post Office Department, and on the 6th day of December, 1841, he decided against it. (See his report, marked A, in which the facts are fully stated.) From the decision of the Auditor an appeal was taken to the First Comptroller, under the act of Congress of July 2, 1836, (5 S. L., page 81,) and said decision affirmed.—(See paper marked B.) By the 8th section of the said act of 1836, it is provided that there shall be appointed by the President, with the consent of the Senate, an Auditor of the Treasury for the Post Office Department, whose duty it shall be to

receive all accounts arising in the said departments, or relative thereto; to audit and settle the same, and certify their balances to the Postmaster General: provided, that if either the Postmaster General, or any person whose account shall be settled be dissatisfied therewith, he may, within twelve months, appeal to the First Comptroller of the Treasury, whose decision shall be final and conclusive. The two items for twenty-three days' continued service on route No. 951, and extra service in January, 1836, were also disposed of adversely by the Auditor, Mr. Whittlesey, on the 19th day of February, 1842. See papers C and D, in which the evidence connected with these demands is fully presented.

The petitioner being dissatisfied with the action thus had in his case, afterwards, to wit, on the 18th day of February, 1847, procured through Congress a joint resolution by which his said claims were referred to the Auditor of the Post Office Department, (Peter G. Washington,) and on the 30th day of September, 1848, he reported against them. See said report, marked E, in which will be found a copy of the resolution of Congress and also a full statement of the facts connected with the plaintiff's demand. From the character of said resolution, and the action had thereon, it seems to us that the petitioner is concluded, and that this court can afford no relief. See *Comegys and others vs. Vass*, 1 Peters, 212; also the decision of this court in the cases of *Letitia Humphreys vs. The United States*, *Thomas vs. The United States*, and *Roberts vs. The United States*. But assuming for the sake of argument that the case is not thus concluded, and that it is competent for this court to give relief, still we think the evidence shows no right in the plaintiff to recover. Proposals were invited by the Post Office Department to carry the mails on routes Nos. 951 and 952, being parallel routes from New York to Philadelphia, and the petitioner bid for them on the 15th of October, 1835, with a condition if he got both to take off 10 per cent. He did get both, and subsequently entered into written contracts to commence the service on the 1st of January, 1836. By the 13th section of these contracts it is provided that the Postmaster General may curtail the service, or dispense with it entirely, he allowing one month's extra pay upon the amount deducted. On the 6th day of December, 1836, the Post Office Department notified the petitioner of the annulment of his contract No. 951, and he was paid one month's extra pay. The claim for \$15,750 damages or any other amount of damage, must depend upon the terms of the contract; and if it appears that the Post Office Department has not violated those terms, then the plaintiff has shown no legal ground to recover. He may have sustained an injury by having his contract unexpectedly terminated, but that injury is not such as to give him a legal right to recover damages of the United States.

The claim for twenty-three days' continued service in the month of December, 1836, is a question of evidence, and the facts will be found fully collected in the report of Mr. Washington before referred to. The item or claim for extra labor, &c., in forwarding the mails from Philadelphia and New York in the early part of 1836, involves a

question of law. The regular through mails had accumulated at these points in consequence of snow and bad weather. They were the mails that belonged to the routes of the petitioner, and but for the bad weather, would have been carried regularly as they arrived, and no charge consequently made for them.

Had they belonged to other routes, and by the contingency referred to thrown upon the petitioner, then he might have justly claimed compensation for their transportation. If he was bound under his contract to carry said mails as they arrived, it was equally his duty to do so when they had accumulated, and no promise on the part of the Post Office agents, of extra compensation, could under the circumstances give the plaintiff a legal demand against the Government.

DANIEL RATCLIFFE,

Assistant Solicitor of the Court of Claims.

No. 6.

ALEXANDER M. CUMMING vs. THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

On the 16th of December, 1835, the claimant contracted with the Postmaster General to carry the United States mail from New York to Philadelphia and back daily, in four-horse coaches and railroad cars on route numbered 951. This contract was on condition that, in case any arrangement should thereafter be made under the authority of Congress, to carry the mails for the whole or any part of the route on railroads, then this contract should be annulled, or there should be a *pro rata* deduction, as the case might be. The compensation for the service was to be \$10,500 per annum, payable quarterly. The contract also contains the following provision: "That the Postmaster General may curtail the service or dispense with it entirely, he allowing one month's extra pay upon the amount deducted, in case he wishes to place on the route a higher degree of service than is contracted for, first offering the privilege to the contractor on the route of furnishing such higher service on the terms that can be obtained: or whenever he shall deem it expedient to lessen the service, or to leave such route or any part of it out of operation, or to convey the mail by steamboat or railroad cars; provided that reduction of compensation in consequence of reduction of service shall not exceed the exact proportion which the service dispensed with bears to the whole service."

On the same day, namely, the 16th of December, 1835, that the above contract was executed, the claimant entered into another contract with the Postmaster General for carrying the mail from New York to Philadelphia and back daily in four-horse coaches and railroad cars, on route numbered 952. The compensation for this service was to be \$8,991 per annum, payable quarterly. This other contract contains a condition relative to the annulment of the contract, and a provision as to curtailing the service or dispensing with it, &c., simi

lar to those we have described as being contained in the contract respecting route number 951.

Both said contracts were to commence on the 1st of January, 1836, and to continue in force until the 31st of December, 1839, unless, &c.

Soon after the claimant commenced the performance of these contracts, namely, in January, 1836, there came on a severe snow storm which for several days prevented the arrival of the mails at Philadelphia from the south, and at New York from the north. On the arrival of those mails, a great accumulation of the mails at those cities took place. In consequence of such accumulation and the snow, the claimant was put to considerable extra expense and trouble in forwarding those mails, for which he charges in his petition, the sum of \$827 71. He was requested by the agent of the Post Office Department to make every exertion to forward the mails thus accumulated, the agent assuring him that the extra expense would be paid by the department. This agent says in his deposition that what he did in the matter was approved of by the department.

We think there can be no doubt but that, in a legal point of view, there is no foundation for this claim.

The claimant in consideration of large sums of money, undertook to carry the mails from New York to Philadelphia, and from the latter to the former, at stated times. The contract makes no provision for additional compensation in case there should be any such accumulation of the mails as above referred to, and the claimant took upon himself the risk of such accumulation. The circumstance that said agent requested the forwarding of those mails by the contractor, and assured him that he would be paid for it extra, and that what the agent thus did was approved of by the department can make no difference. The claimant did no more than he was bound to do by his contract of the 16th of December, 1835, and the government is not liable to pay him more for his services than that contract provides for. The promise here relied on for extra pay was without consideration. The sailors who during a storm made extraordinary exertions to save the ship on the captain's promise of extra pay, were entitled only to their ordinary wages, because it was their duty to do all they could to save the ship. The true doctrine is, that the mere performance of an act which the party was by law bound to perform, is not a sufficient consideration for a promise of extra pay for such performance.—(1 Selwyn's Nisi Prius, 43.) In an able report from the office of the Auditor of the Post Office Department against this claim, it is said: "Instances of double mails to be forwarded in consequence of the failure of a mail in a connecting line, from floods, storms, or accidents, have been of constant occurrence in the department without furnishing ground for additional compensation to the contractor. The accumulation in Mr. Cumming's case may have been greater than usual, but the excess does not affect the principle."

The next claim is for carrying the mail on said route 951 for twenty-three days—that is, from the 7th of December, 1836, to the end of that month. The charge for this service is \$700. The material facts are believed to be as follows :

The claimant's contract for carrying the mail on route 951 contains a provision to which we have referred, authorizing the Postmaster General to annul the contract at any time on allowing one month's extra pay. That officer in November, 1836, made an arrangement with the Camden and Amboy Railroad Company for carrying the great mail between New York and Philadelphia (the same that was then carried on route 951 by the claimant) from and after the 15th of November, 1836. On the 14th of that month the department made a proposition to Mr. Cumming (which he accepted) for an improvement on route 952, rendered necessary by the transfer of the great mail, and offered him \$3,009 per annum for such improvement; and, in a postscript to the letter, it is said: "You will continue carrying mails on routes 951 and 952 until otherwise ordered." Afterwards, on the 6th of December, 1836, the department wrote to Mr. Cumming as follows:

"SIR: An arrangement having been made with the Camden and Amboy Railroad Company for the conveyance of the great mail between New York and Philadelphia, and you having accepted the offer of the department for an improvement on route No. 952, which will supply certain of the towns in New Jersey with the mail for which they depended on route No. 951, the Postmaster General has directed that your contract on route No. 951 be annulled, and that you be allowed one month's extra pay."

It appears that the change of schedule, to meet the new arrangement, is dated the 27th of December 1836.

There is the following statement by the Auditor of the Treasury of the Post Office Department:

"Upon the arrangement being made with the Camden and Amboy Railroad Company, the great burden of the mail was removed from Mr. Cumming, whether on route 951 or 952. All the through mail was of course carried upon it, and nothing was left for Mr. Cumming but the mail to and from the intermediate offices. It is a mistake, therefore, to suppose that Mr. Cummings continued *the service* on 951 after the 7th December, 1836; in fact, he had ceased to carry the great mail as well as a portion of the mail usually sent on 952, from the 15th November, although he continued to be paid for both precisely as if he had carried the two entire mails to the former day, with the addition of one month's extra pay, which, I think, the Postmaster General might well have withheld under the stipulation in contract 951 before recited, if he had thought proper so to do."

We are of opinion that, according to the above stated facts, there is no legal ground for this claim. The contract as to route 951, was legally annulled by the Postmaster General's order of the 6th of December, 1836, and from the time of notice of that annulment, the claimant had no authority to carry any mails on that route. He contends that the direction in the postscript to said letter of the department of the 14th of November, 1836, continued to be in force till the new schedule aforesaid was delivered. But that is impossible. No more positive direction to the claimant to cease carrying the mails on route 951 could have been given than the absolute annulment long

after said postscript was written, namely, on the 6th of December, 1836, of the whole contract in regard to that route. If the claimant carried any of the mails on said route 951 after notice of said annulment, (and we believe he did continue to carry some of them till the last of December, 1836,) they were carried without authority, and he can have no legal claim for doing so. Individuals cannot create debts in their favor against the government without its consent.

Both the above mentioned claims were presented to the Postmaster General and rejected by him on the merits. Afterwards, in 1847, Congress by a joint resolution referred the same claims for determination to the Auditor of the Treasury for the Post Office Department, who, in 1848, gave a written decision against them.

The third claim is for the ten per cent. which was deducted from the \$9,990 mentioned in one of the proposals of the claimant for carrying said mails, which proposals were substantially as follows: To carry the mail on route 951 daily for \$13,125 per annum, or, if the proposal for route 952 was accepted, then 20 per cent. to be deducted from the \$13,125; also, to carry the mail on route 952 daily for \$9,990 per annum, or, if the proposal for route 951 was accepted, then 10 per cent. to be deducted from said sum of \$9,990. The proposals were accepted, and the before mentioned contracts entered into accordingly.

The claimant contends that upon the annulment of the contract for route 951 he became entitled to the \$9,990 per annum for carrying the mail on route 952 instead of the \$8,991 which he received.

The answer to this claim is, that the claimant contracted to carry the mail on route 952 for \$8,991 per annum, and there is no provision that he should have, under any circumstances, anything more for that service. As to the annulment of the contract for route 951, that was authorized by the express terms of that contract on payment of one month's extra pay, which payment was made.

The fourth claim is for \$15,000 damages, alleged to have been sustained by the claimant in consequence of the said annulment of the contract for route 951. But we have already shown that that annulment was legal, it being authorized by the express terms of the contract.

We have now noticed all the claims presented by the petition, and are of opinion that the claimant has no cause of action.

